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No. 415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

LONG ISLAND LIGHTING COMPANY, PHILADELPHIA ELECTRIC COMPANY, and PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*,

v.

PAN AMERICAN PETROLEUM CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered on March 9, 1967 in *Pan American Petroleum Corporation, et al.* v. *Federal Power Commission, et al.*, Tenth Cir. No. 7912, *et al.*

OPINIONS BELOW

The opinion of the court of appeals (FPC Pet. 8-28)[1] is reported at 376 F.2d 161, and its opinion denying

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[1] "FPC Pet." refers to the petition for a writ of certiorari filed by the Solicitor General on behalf of the Federal Power Commission in No. 227, This Term (originally No. 1459, O.T. 1966).

rehearing, entered May 22, 1967 (FPC Pet. 29-33), is reported at 376 F.2d 173. The opinion and order of the Federal Power Commission are reported at 32 FPC 254.

JURISDICTION

The judgments of the court of appeals (FPC Pet. 34-39) were entered on March 9, 1967, and rehearing was denied by the court of appeals on May 22, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

QUESTION PRESENTED

Where the Federal Power Commission, having issued an *ex parte* temporary certificate to a producer pending hearing and disposition of the producer's application for a certificate of public convenience and necessity, determines after the statutorily required hearing on the application that the price collected pursuant to the temporary certificate was out of line and not consistent with the public convenience and necessity, does the Commission have the power to require the producer to refund the excess amounts collected under the temporary certificate?[2]

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[2] In addition to reversing the Commission on the refund question, the court of appeals remanded the case to the Commission "to give the Commission an opportunity to show that there was in fact a reasonable basis for its action" in fixing the certificating level for sales subject to the Louisiana severance tax at a level 1.5¢ per Mcf higher than for sales not subject to such tax. Accordingly, while we believe the court below was in error (and the Commission's original opinion was correct) on the tax issue, we do not believe that, at this stage, the issue is ripe for disposition by this Court. We reserve, however, our right to challenge the court of appeals' error at some later point in this proceeding should the occasion warrant, *Mercer* v. *Theriot*, 377 U.S. 152 at 153-154 (1964).

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. §§ 717-717w, are set out at pages 2-3 of the FPC Petition.

STATEMENT

Petitioners adopt the Statement set forth at pages 4-5 of the FPC Petition.

Supplementing that Statement, petitioners would note that they were intervenors in the FPC proceedings out of which the present case grew; that before the FPC they urged that the producers be required to refund all amounts in excess of the in-line level which had been collected under temporary certification; and that, on appeal by the producers to the Tenth Circuit, petitioners each intervened in support of the Commission's order.

REASONS FOR GRANTING THE WRIT

Three months before its decision in the instant case, the Tenth Circuit had held, in *Sunray DX Oil Co.* v. *F.P.C.*, 370 F.2d 181, that the Commission lacked power to order refunds of excess amounts collected under temporary certificates in the absence of an express refund condition in the temporary certificate. Petitions, filed by the instant petitioners,[3] the FPC,[4] and others,[5] for a writ of certiorari to review the *Sunray* judgment are presently before this Court.

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[3] *Brooklyn Union Gas Co., et al.* v. *F.P.C., et al.*, No. 62, This Term (originally No. 1135, O.T. 1966).

[4] *F.P.C.* v. *Sunray DX Oil Co.*, No. 60, This Term.

[5] *United Gas Improvement Co.* v. *Sunray DX Oil Co.*, No. 61, This Term; *Texaco Inc.* v. *F.P.C.*, No. 82, This Term.

In the instant case, the court below purported to do no more on the refund issue than follow its own *Sunray* precedent. It therefore follows that if *Sunray* was incorrect and warrants the issuance of a writ of certiorari, then a writ of certiorari is also required in the instant case. Accordingly, we would respectfully refer the Court to pages 17-23 of our petition in *Sunray—Brooklyn Union Gas Co., et al.* v. *F.P.C., et al.*, No. 62, O.T. 1967.[6]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] We would also note, as has the FPC (Pet. p. 6 n. 6), that subsequent to the filing of the petitions for certiorari in *Sunray*, the Fifth Circuit decided the refund issue in conflict with the Tenth Circuit, *Continental Oil Co.* v. *F.P.C.*, Fifth Cir. No. 23188 *et al.*, May 24, 1967.